No. 18541

In the
United States Court of Appeal
For the Ninth Circuit

R. W. AGNEW,

Plaintiff and Appellant,

vs.

RICHARD W. MOODY, MACK E. RHODES, CHARLES B. RUSSELL, ELBERT E. STANFORD, B. C. ESTES, WILLIAM H. PARKER, RICHARD LASKIN, ROGER ARNEBERGH, PHILIP GREY, EDWARD L. DAVENPORT, ROBERT L. BURNS, WILLIAM B. BURGE, WILLIAM DORAN, NORMAN TULIN, HOWARD H. SCHMIDT, CHARLES HURD, CLARA CLAPP, G. VELLA CONSTRUCTION COMPANY, a corporation, DOMINIC GIANGREGORIO CONCRETE CONSTRUCTION COMPANY, a corporation,

Defendants and Appellees.

Appellees' Brief

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Appellees' Reply Brief

STATEMENT OF THE CASE

The record before this Honorable Court discloses that the plaintiff in error, Mr. Agnew appeals from:

(1) the order of November 5, 1962 dismissing the Amended Complaint with prejudice as to all defendants except defendants MOODY and RHODES, and as to defendants MOODY and RHODES dismissing

the Amended Complaint without prejudice with leave to plaintiff to amend within twenty days; and from

(2) the Order dismissing the action, entered on February 12, 1962 (Clerk's transcript, page 122).

This action arose when the appellant received a traffic ticket issued by the Los Angeles Police Department. The matter went to trial in the Los Angeles Municipal Court before the defendant HOWARD SCHMIDT, Judge of said court. After a lengthy trial, the appellant was convicted and an appeal was taken to the Appellate Department of the Superior Court wherein the appellant urged each point herein raised by the Amended Complaint. The Appellate Department unanimously affirmed the Judgment of conviction without an opinion. Prior to execution of sentence, Mr. Justice Douglass of the United States Superior Court issued a stay order pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court.

The present action was filed during the course of the Municipal Court proceedings. This Honorable Court is respectfully requested to take Judicial Notice of the records and files of the Los Angeles Municipal Court Action No. 760466 entitled *People of the State of California v. R. W. Agnew.* Said records are currently before the United States Supreme Court in the aforementioned Petition for Writ of Certiorari in *Agnew v. California.*

The Amended Complaint in the case at bar clearly discloses that the appellee HOWARD H. SCHMIDT is a Judge of the Municipal Court of Los Angeles Judicial District. Appellee NORMAN TULIN is an official Court Reporter of said Municipal Court. (Clerk's transcript, page 2) Both aforementioned appellees appeared in the case at bar by moving to dismiss the amended complaint. The appellees CLARA CLAPP and CHARLES HURD are the duly appointed Clerk and Bailiff of said court. The Amended Complaint was dismissed before either defendant appeared.

The issues presented as to appellees SCHMIDT and TULIN are:

(1) whether the Amended Complaint violated Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE. [28 U.S.C.A.]; and

(2) whether or not they are entitled to immunity from prosecution.

I.

THE DISTRICT COURT PROPERLY DISMISSED THE AMENDED COMPLAINT SINCE SAID COMPLAINT VIOLATED RULE 8 OF THE FEDERAL RULES OF CIVIL PROCEDURE [28 U.S.C.A.]

Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE requires ". . .

> (2) a short and plain statement of the claim showing that the pleader is entitled to relief, . . ." [28 U.S.C.A.]

In the case at bar the appellant R. W. Agnew filed an Amended Complaint consisting of fifty-five pages containing eighty-one paragraphs. The complaint rambled on in narrative fashion and attempted to set forth three causes of action under the Federal Civil Rights Act, to wit: 42 USC 1983; 42 USC 1985; and 42 USC 1986, against nineteen defendants.

A. It is elementary that only well pleaded and material allegations of a complaint are assumed to be true, while Conclusions of law and unwarranted deductions of fact are not admitted on the hearing of a motion to dismiss.

John and Sal's Automotive Service Inc. v. Sinclair Refining Co., D.C.N.Y., 1959, 177 F Supp. 201.

B. Judicial notice may be taken of a fact to show that a complaint does not state a cause of action.

Sears, Roebuck and Co. v. Metropolitan Engravers, Limited, C.A. 9th Circ. Cal. 1957, 245 F. 2d 67;

Yudin v. Carrol, D.C. Ark., 1944, 57 F. Supp. 793.

The District Court was entitled to look to the records and files of the Los Angeles Municipal Court in considering the appellee's motion to dismiss.

C. The Amended Complaint filed by the plaintiff in error is a clear violation of the rule that a short and concise statement must be pleaded.

Federal Rules of Civil Procedure, Rule 8 [28 U.S.C.A.].

In ruling on the Motions to Dismiss in the case at bar, the court said,

"THE COURT: Well, Mr. Agnew, I have gone over the complaint, the pleadings. I am going to dismiss the complaint in its entirety because you have failed to comply with Rule 8, in failing to file a short and plain statement. Also I am going to dismiss with prejudice as to all defendants other than Moody and Rhodes, who are the police officers who stopped you, and I will dismiss without prejudice as to them. You may be able to state a cause of action against the officers who stopped you, but you certainly cannot state a cause of ac-

> tion against a judge, the United States Attorney, or the court reporter, or the marshal, or anybody else. The action will be dismissed, the complaint will be dismissed in its entirety for the failure to comply with Rule 8, Subdivision A. The dismissal will be with prejudice to all defendants except the two police officers, Moody and Rhodes, and that will be without prejudice, so if the plaintiff wants to file a complaint against Moody and Rhodes and comply with the rule, I will be glad to hear it." (Rep. Tr., page 14, l. 17 to page 15 l. 10).

A failure to comply with Rule 8 *Federal Rules of Civil Procedure* [28 U.S.C.A.] makes the complaint in issue subject to a motion to dismiss. As was held in *Condol v. Baltimore and Ohio Railroad Co., et al.*, C.A.D.C., 1952, 199 F. 2d 400 at page 402:

> "Condol's complaint fills twelve pages of the printed appendix which is before us and contains 45 numbered paragraphs. It is a tedious recital of evidential matter and falls far short of being the crisp statement which for the Rule requires. In a case as simple as this one, there is no justification for such a complaint and a defendant should not be required to plead to it."

Taylor v. United States Board of Parole C.A.D.C. 1951, 194 F. 2d 882;

McCann v. Clark C.A.D.C. 1951, 191 F. 2d 476.

So too, the appellant's complaint not only violated the rule of the *Condol* case (supra) but also disclosed

the fact that the majority of defendants were entitled to Immunity.

The Amended Complaint could not have been amended further so as to rob these defendants of the immunity granted to them. Therefore, the District Court in exercising its discretion, had every right to dismiss the Amended Complaint with prejudice as to all parties except MOODY and RHODES. Leave to amend need not be granted where such would serve no useful purpose.

In *Lone Star Motor Import Inc. v. Citroen Cars Corp.,* C.A. 5th Circ. 1961, 288 F. 2d 69 the court held at page 77:

> "In most of such cases the unsuccessful plaintiff or defendant must be given an opportunity of filing an amendment *unless it appears reasonably certain under the accepted test no evidence is available to make out a claim or defense."* (Emphasis Added)

The District Court, in dismissing the Amended Complaint in the case at bar, informed the appellant why the said complaint was being dismissed (Clerk's transcript, page 120). This case is consistent with the holding in *Bananno v. Thomas,* C.A. 9th Circ. 1962. 309 F. 2d 320 where this Honorable court said at page 322:

> "Moreover, if this complaint was dismissed for failure to state a claim on which relief could be granted, leave should have been granted to amend

> unless the court determined that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency. We find no indication of such a determination in this record. It is of no consequence that no request to amend the pleading was made in the district court. *Sidebotham v. Robison,* 9 Cir., 216 F. 2d 816, 826."

The record in the present action clearly indicates that the appellant could not possibly cure the defects contained in the Amended Complaint.

II.

APPELLEES SCHMIDT AND TULIN ARE ENTITLED TO JUDICIAL IMMUNITY.

A. As to the Appellee HOWARD H. SCHMIDT, the case authority is legion to the effect that judges of courts are entitled to judicial immunity.

The affidavit of HOWARD H. SCHMIDT discloses that said appellee is a Judge of the Municipal Court of Los Angeles Judicial District (Clerk's Transcript, Page 78). Said appellee is referred to in the Amended Complaint in the case at bar as the Judge who presided in appellant's criminal trial.

The immunity granted to Judges of Courts extends to causes of action based on the Federal Civil Rights Act [42 U.S.C.A.].

In *Perkins v. Rich,* D.C. Del. 1962, 204 F. Supp. 98 Senior District Judge Rodney said at page 101:

> "The plaintiff in some light way indicated reliance upon the Civil Rights Act, 42 U.S.C.A., 1981, 1983. Without at all conceding that the indicated facts show any cause of action under the cited Act, I am of the opinion that the principle of judicial immunity has equal application under that Act as in other appropriate cases . . . "

An even stronger holding is found in *Rudnicki v. McCormack,* D.C. R.I., 1962, 210 F. Supp. 905 at page 907. There it was held:

> "Insofar as the judicial defendants are concerned, it has long been settled that judges, both state and federal, are immune from civil liability for their judicial acts (cases cited). This immunity extends to suits, such as the present ones, for alleged deprivation of civil rights under the Civil Rights Act . . . "

The cases of judicial immunity turn on whether or not the named defendant judge was exercising or performing a "judicial function" at the time the alleged cause of action arose. If the defendant was so performing, then immunity attached.

In *Yates v. Village of Hoffman Estates,* D.C. Ill. 1962, 209 F. Supp. 757, the District Court brought the issue of judicial immunity into sharp focus, and set down the doctrine of "judicial function."

The court held at page 747:

> "A judge must be free from concern that civil liability will be sought by an unsuccessful litigant

who ascribes his misfortune to judicial malice and corruption. *Bradley v. Fisher,* 1871, 80 U.S. (13 Wall) 335, 348, 20 L. Ed. 646. Similarly, judicial independence requires immunity from civil liability resulting from the multitude of procedural decisions which must necessarily be rendered in each case heard. (c.f. 68 *Harv. L. Rev.* 1229, 1237, (1955)), even though a particular decision is erroneous (c.f. *Ryan v. Scoggin,* 10th Cir. 1957, 245 F. 2d 54, 58 (dictum)), or even malicious (cases cited).

"However, not every action by a judge is in exercise of his judicial function. For example, it is not a judicial function for a judge to commit an intentional tort even though the tort occurs in the courthouse. . . . "

The appellant urges three points in support of the proposition that the appellee SCHMIDT is not entitled to judicial immunity:

1. That the Civil Rights Act recognizes no judicial immunity; and
2. That even if the Civil Rights Act has not abrogated the Common Law, Judicial Immunity, there is no immunity for "extraordinary" wrongful acts; and
3. That this appellee lost jurisdiction upon the filing of a Declaration of Bias and Prejudice under California Code of Civil Procedure, Section 170, Subdivision 5.

The appellant's first point, to wit: That the Civil Rights Act does not recognize judicial immunity has

been answered heretofore, and said point on appeal is clearly without merit.

The appellant's second point, to wit: That the principle of judicial immunity does not cover "extraordinary" acts, appears to be a creature of the appellant's own imagination. The appellant in Appellant's Opening Brief, page 39, Lines 18-23 states the following:

> "There are cases which deride the *Picking* case, supra, 151 Fed. 2d, 240 and make claim that complete judicial immunity even for extraordinary wrongful acts is a 'necessity' for operation of the courts. Then, *this is, of course, especially as to extraordinary wrongful acts simply not so. . . .* " (Emphasis added).

This appellee submits that there is no authority for said proposition.

Appellant's third point, to wit: That the appellee HOWARD H. SCHMIDT lost jurisdiction upon the filing of a Declaration of Bias and Prejudice under the Code of Civil Procedure, Section 170, Subdivision 5 is likewise without merit. The case law stands for the proposition that if a judge has jurisdiction of subject matter of the action and jurisdiction of the person of the defendant, then immunity attaches once and for all, and even wrongful decisions will not deprive said judge of the immunity to which he is rightfully entitled.

> *Yates v. Village of Hoffman Estates,* Ill. (supra).

By way of illustration this appellee wishes to point out to the court the appellant's statement contained in the Appellant's Opening Brief at the last line of Page 21 over to Page 22, Line 6, wherein the following is found:

> "It would be appropriate to point out also that the Reporter's Transcript discloses a bias and prejudice bordering on animosity on the part of Judge Westover toward plaintiff, because, apparently, plaintiff had the gall to apear before the judge in his court in *propria persona,* and in response to questions of the judge make answer as to opinion of the law as a layman. . . ."

For other cases treating the subject of Judicial Immunity, see:

Saier v. State Bar of Michigan, C.A. 6th Cir. 1961, 293 F. 2d 756;

Yaselli v. Goff, C.A. 2d Cir. 1926, 12 F. 2d 396;

Nicklaus v. Simmons, D.C. Neb. 1961, 196 F. Supp. 691;

Cahn v. International Ladies' Garment Union, D.C. Penn. 1962, 203 F. Supp. 191.

B. Appellee NORMAN TULIN, an official Court Reporter is entitled to Judicial Immunity.

A position of Court Reporter partakes the nature of a public office and as such any duties imposed on such office are owed to the public at large and not to private individuals.

The attention of the Court is directed to the case of *Peckham v. Scanlon,* C.A. 7th Cir. 1957, 241 F. 2d 761 wherein is found a set of facts much the same as those in the case at bar. The plaintiff in the *Peckham* case, (supra) sought to recover under the Civil Rights Act, (42 U.S.C.A.) 1983 and 1985. One of the offenses alleged was that the Court Reporter, one Kaylor, failed and refused to prepare a transcript for a criminal defendant. The court stated at page 763 "It is also our view that Kaylor is immune from prosecution under the Civil Rights Act."

CONCLUSION

This Honorable Court is respectfully requested to affirm the order of the District Court dismissing the action as to the Appellees SCHMIDT AND TULIN. This Court is further requested to affirm the Order of the District Court dismissing *sua sponte* the action as to Defendants HURD and CLAPP. The appellees request also that they be granted costs incurred herein.

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